

Testimony of
Assistant Secretary for Policy and International Affairs
Matthew V. Scocozza
before the
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Committee on Public Works and Transportation
Subcommittee on Aviation
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Introduction

Mr. Chairman, members of the Committee. I appreciate this opportunity to discuss with you today the FAA's recently published information for issuing exemptions from the noise compliance requirements of FAR 91.303. Those standards require all subsonic aircraft operated at U.S. airports on and after January 1, 1985 to meet at least stage 2 noise levels.

In your May 6th letter to the Secretary, you stated your concern that the Department's actions were inconsistent with the intent of Congress as expressed in the Conference Report accompanying the Aviation Safety and Noise Abatement Act of 1979 (ASNA). You asked several questions about our implementation of ASNA. First, you wish to know the reason for changes from previously articulated policies, changes that resulted in the FAA's issuance of several exemptions in late December 1984 and early January 1985. Second, you wish to know the justification for further changes in the Department's policies, which were set forth in the April 26, 1985 exemption granted LAC, a Colombian cargo carrier.

You also asked that we discuss the policies that DOT and FAA intend to follow in the future and the consistency of these policies with Congressional intent and the public interest. As you are aware, Mr. Chairman, all of these issues are currently the subject of litigation. Accordingly, I may be precluded from expanding on my explanations.

Statement of Policy

Mr. Chairman, we share your concern that noise compliance deadlines be adhered to and we take seriously the government's commitment to do so. We support fully the noise abatement objectives and policies contained in the ASNA. We also understand your concern that the Department may appear to have "shifted" its position on issuing noise exemptions. We hope our testimony and our answers to your questions will demonstrate that our actions are fully consistent with the intent of Congress and the public interest.

Background on Implementation of the ASNA

Before I turn to the events surrounding our decisions of December 1984 and January 1985, and our April 26, 1985 noise exemption order, an overall perspective on implementation of the ASNA is useful.

The Conference Committee report recognized that full compliance by the established deadline might create hardship situations.

In that report, Congress urged FAA to give consideration to hardship cases involving operators of four-engine aircraft which meet five criteria. To paraphrase the Report, a hardship situation occurs when: The applicant is a (1) "smaller carrier" providing (2) "valuable airline service", is making (3) "a good faith compliance effort" but (4) "needed technology is delayed or unavailable, and (5) could suffer "financial havoc" without the exemption. The Act also mandated blanket exemptions until 1988 to U.S. and foreign carriers having the capability to provide "small community service". As the Chairman knows, this resulted in the FAA issuing over 500 exemptions, mostly to larger U.S. carriers, for certain stage 1, two-engine aircraft: The older DC-9s and 737s, and the BAC-111s. Every day, these aircraft take off and land many times at hundreds of U.S. airports, some of which are noise sensitive.

After the ASNA was signed into law on February 18, 1980, FAA immediately amended its regulation to implement the Congressional mandate. Throughout the intervening years the Department repeatedly stressed that it would hold firm to the January 1, 1985 deadline. As you will recall, that deadline was established at the time the original noise compliance regulation was issued in 1976. FAA stated clearly in the preamble to the regulation and in the DOT/FAA Aviation Noise Abatement Policy of 1976, that it would impose unilaterally the same 1985 deadline for compliance by both U.S. international and foreign operators if no agreement could be reached between the U.S. and foreign governments by 1980.

Early in 1984, Secretary Dole said that "few, if any," exemptions could be expected. The Federal Aviation Administrator made the same statement. The Department believed that the enunciation of this policy would demonstrate its serious commitment to enforcing compliance. We expected that operators of noncomplying aircraft would arrange for compliance. We received, and appreciated, strong support from this Committee during that period.

In early 1984, the FAA received many petitions for blanket, three-year exemptions, petitions which failed to include any evidence of good-faith efforts, such as a contractual obligation to achieve compliance by retrofit, reengining, or replacement. Each petition was turned down, citing a failure to meet the Congressional criteria.

Some petitioning carriers, some local airport authorities, and other interests then turned to Congress. Up until that time, the only Congressional guidance on this subject was contained in the ASNA's Conference Report and in the letters from the Committee. In the fall of 1984, there was a flurry of Congressional activity and the clear message to the Department was that exemptions should be granted. Despite the Department's opposition, the Congress passed the Hawkins/Chiles Amendment, and on October 12, 1984, Section 124 of P.L. 98-473 went into effect.

Hawkins/Chiles is particularly interesting when viewed against the five criteria suggested by the 1979 Conference Report. In effect, this statute waived all criteria except for "good faith compliance", which it defined as being satisfied by a carrier's firm contractual commitment, accompanied by a substantial deposit, to retrofit or replace noncomplying aircraft. In particular, Hawkins/Chiles recognized that hush kits might be the only economically feasible means of achieving compliance for the many smaller carriers.

In the weeks immediately following enactment of the Hawkins/Chiles amendment, FAA granted exemptions to 25 carriers operating 55 noncomplying aircraft into Miami and Bangor. Nearly all of these exemptions, which were mandated by Congress, were conditioned on firm hush-kit contracts. Further, the majority of the Hawkins/Chiles exemptions were given to foreign carriers.

After P.L. 98-473 was passed, FAA continued to deny exemptions based on a strict interpretation of each Conference Report criterion, and by requiring that all five criteria be met simultaneously. By the end of November only two general exemptions had been issued, one to Icelandair and the other to Caribbean Air Cargo.

However, the nature of petitions for those general exemptions changed after Hawkins/Chiles. Before Hawkins/Chiles, many petitioners apparently believed that Congress would mandate

blanket, unconditional three-year exemptions for all. Hawkins/Chiles settled that issue, and provided a significant boost to the hush kit market. Now, as the end of 1984 approached, petitioners were placing deposits and signing firm contractual commitments for hush kits which, at a typical cost of \$2.8 million per aircraft, often exceeded the purchase price of the aircraft itself.

- Status of Noise Abatement Technology

However, as we approached the end of 1984, a major uncertainty remained about the availability of hush kits that would permit many of the old four-engine aircraft to meet stage 2 noise levels.

While the FAA had demonstrated hush-kit technology for the Boeing 707 in the early 1970's, manufacturers were reluctant to make the engineering and development expenditure to market the kits until they had assurance of sufficient orders. On the other hand, customers were reluctant to place orders for equipment that had not yet been manufactured, or even certificated by FAA.

This chicken and egg situation was a principal source of delay in the development of hush kits. By early 1984, several manufacturers were exploring hush kit development for the B-707 and DC-8-50 and DC-8-60 series aircraft. The FAA had hoped to be able to certificate one manufacturer by late summer and another in the fall. The schedule, of course, was dependent on the success

and speed of the manufacturers in complying with certification requirements. As the end of 1984 approached, however, no manufacturer had completed these requirements, and DOT was faced with a situation where all applicants for exemptions were claiming that hush-kit equipment--if not the technology--was delayed or unavailable.

Situation in December, 1984

By December 1984, the consequences of not granting exemptions to certain operators became clear to us. We were not dealing with major carriers requesting exemptions for only 5 or 10 percent of their fleets. We were dealing with carriers operating 707s and DC-8s almost exclusively. In these cases there was no question about what would happen if exemptions were denied. The carrier would cease service and go into bankruptcy, even though it had executed a contract for an as-yet-uncertificated \$2.8 million hush kit and had made a non-refundable deposit.

As December 31st approached, it became apparent that we had to choose between achieving noise compliance by grounding a number of smaller carriers, or by granting exemptions and letting the hush kit market work. We made a judgment call. We decided not to put carriers out of business if they were willing to bind themselves contractually, and make a substantial deposit, to hush kit their planes. We decided to do this in the context of the ASNA, which had already mandated blanket exemptions until 1988 for

large and small U.S. carriers operating two-engine, stage 1 aircraft; the ASNA Conference Report, which urged that we take into account "hardship situations;" and the Hawkins/Chiles Amendment, which mandated exemptions for certain carriers that had contracted for hush kits or replacement aircraft.

We also had to consider the effects of our decisions on the hush-kit manufacturing industry. It became clear that without exemptions, several carriers, some of which had placed large orders that launched certain hush kit programs, would not be able to fulfill their contractual obligations. These events would have most certainly added further delays to hush kit certification.

During this same period, the Department received communications from the Department of State and the Office of the United States Trade Representative, informing us of the foreign policy issues that could arise out of the denial of exemptions. These foreign policy considerations were also included in evaluating petitions for exemptions. The Department, however, has not granted a single exemption on the basis of foreign policy considerations alone.

We therefore required that carriers enter into firm contracts for hush kits or replacement aircraft ("good faith compliance"), and (1) either show that they provided a "valuable airline service", and that without the exemption they would go into bankruptcy ("financial havoc") or (2) that they provided essential

air service as defined in Section 419 of the Federal Aviation Act. Between December 28 and early January the FAA issued 15 additional exemptions.

Taking our lead again from criteria used by Congress in the Hawkins/Chiles Amendment, we limited each carrier's exemption to only the period necessary for retrofit and to the total number of operations conducted in the comparable period in 1984. We attempted to restrict these operations to a minimum number of cities. We also imposed a nighttime curfew and rigorous reporting requirements designed to help us enforce the conditions and limitations imposed by the exemptions.

We recognize that all operators had been on notice for eight years, and that the hush kits could have been certificated and available had the operators generated sufficient demand early enough. But that did not happen, and we faced a "real world" situation requiring an immediate judgment call. We had to make a basic choice between achieving noise compliance by grounding carriers or by allowing the hush kit market to work. We chose the latter course and today noise compliance is being achieved. We made that choice, Mr. Chairman. We are convinced that our decision served the public interest.

The March 29 Court Decision and the LAC Exemption of April 26

Several carriers sought emergency stays of the applicability of the FAA's noise compliance rule before the U.S. Court of

Appeals for the D.C. Circuit and in other circuits. On January 4, the D.C. Circuit granted the first of a number of indefinite stays pending its resolution of the issue. Eventually, twenty-eight carriers received stays.

On March 29, the Court remanded three petitions to the FAA in its decision in the Airmark Case (No. 84-1619). The Court basically stated that (1) FAA had the authority to grant exemptions, that (2) FAA retains broad discretion to determine whether the public interest will be best served by granting or denying petitions, and that (3) whatever criteria FAA uses must be applied in a consistent manner.

In response to the Court of Appeal's decision, we chose to enunciate definitions for the five ASNA Conference Report criteria, and to apply those criteria to the remanded petitions. Our definitions reflected the objective of achieving noise compliance by allowing the hush-kit market to work. FAA fully explained these definitions in Exemption No. 4302, issued on April 26 to the Colombian cargo carrier Lineas Aereas del Caribe, S.A. (LAC), and we are determined to act consistently with the LAC decision in granting or denying other exemption requests. That exemption has been published in the Federal Register.

I would like to comment on our definitions of the five Conference Report criteria. However, I regret, Mr. Chairman, that my comments in this area have to be brief. As I have already mentioned, this matter is currently the subject of litigation:

Smaller Carrier. We defined a smaller carrier as one which on January 1, 1985 operated nine or fewer aircraft or had 1,500 or fewer employees. Both definitions are found in statutes or other FAA regulations.

Good Faith Compliance. Following the lead of P.L. 98-473, we recognized as evidence of a good faith compliance effort the execution of a firm contract, by March 29 (the date of the Court decision), to retrofit or replace noncomplying aircraft

Financial Havoc. We devised two alternative tests: (a) that the operations covered by the general exemption constitute at least 20% of 1984 operations over the same period; or (b) that the deletion, from the operator's financial database, of the revenue produced by noncompliant U.S. operations barred by the noise rules, absent any kind of exemption (including one issued under Hawkins/Chiles), would result in a net loss of greater than 10% of the operator's assets. This criterion does not allow an airline to bootstrap a claim of financial havoc by acquiring noisy aircraft after the January 1st deadline. Carriers may not obtain an exemption for non-complying operations initiated after January 1, 1985.

Technology Delayed or Unavailable. Once again, we followed the lead of P.L. 98-473 and recognized that hush kits were the only economically practical method of achieving compliance for most smaller carriers, and that the commercial availability of these kits had been delayed.

Valuable Airline Service. We determined that if the airline provided service prior to January 1, 1985, it would be deemed "valuable."

In addition, we are imposing conditions on the exemptions to limit environmental impact. Specifically, grants of exemption (a) are for the specific aircraft for which firm hush-kit or replacement contracts were executed by March 29, 1985, (b) permit only daytime operations at airports other than Bangor and Miami International airports, and (c) allow only as many operations in 1985 as were conducted in the comparable period in 1984.

While we are granting no exemptions beyond this year, we have stated that an exemption will, if necessary, be extended to the earliest possible installation date beyond 1985, but only for a carrier that has contracted with a hush kit manufacturer that receives certification by September 30, 1985.

Environmental Progress

Some would have you believe that the FAA has been handing out exemptions with abandon. That, of course is false. FAA has denied far more exemptions than it has granted. In fact, the FAA has approved only 17% of the 113 petitions sought under its general exemption authority.

Most importantly, the LAC decision now limits the number of aircraft which will receive general exemptions, and, based on a preliminary review of exemption requests, we do not expect that

number to be more than 100 aircraft. Since perhaps as many as 50 of these aircraft would have been exempted anyway under Hawkins/Chiles, we have really exempted only about 50 aircraft by exercising our discretionary authority. Let's look at that number:

-- It represents only about 1 1/2 percent of the total U.S. commercial jet fleet, and an even smaller percentage of the total U.S. and foreign jet fleet serving the U.S.

-- It is less than 10 percent of the aircraft for which Congress mandated exemptions under the "small community" provision of ASNA.

-- It is a 57 percent reduction from the number of four engine stage 1 aircraft operated in the U.S. in 1984.

Finally, Mr. Chairman, if the hush kit production programs go as expected, by this time next year only 30 to 40 noncomplying four-engine aircraft should still be operating under exemptions. That, of course, represents a 60 to 70 percent reduction from the 100 aircraft exemptable today.

Conclusion

Mr. Chairman, we appreciate the Committee's concern, and your concern in particular. Congress provided us discretionary authority and a widely-varying set of mandates. We had to operate in a

number of contexts, including that of foreign policy. Hard choices had to be made. The unavailability of hush kits--the only practical means of achieving compliance for most of these smaller carriers--presented a major impediment to our program.

Hush kits for two series of aircraft models are now certificated, and we anticipate that hush kits for additional models will be certificated before September 30. Again, we expect that fewer than 100 aircraft will ultimately receive general exemptions, and if hush kits are installed as expected, by this time next year only about 30 to 40 aircraft should still be operating under exemptions.

We shall continue to scrutinize the process to assure that retrofit is completed in a timely manner. We shall also continue to monitor aircraft operations to assure compliance with the noise rules and with the conditions of each exemption. Our enforcement actions to date have been effective. FAA already seized an aircraft of one carrier, and has others under investigation. Its threat to seize an aircraft of yet another carrier deterred further unauthorized flights of that carrier into the U.S. We are also determined not to allow carriers with noncomplying aircraft to frustrate noise compliance by obtaining extraordinary economic authority from the Department. In this regard, we recently denied a request by one carrier to conduct an unprecedented number of wet

lease operations with noncomplying aircraft. We took this action under our independent economic authority even though the carrier has a court stay precluding the enforcement of FAA's noise rule.

Notwithstanding the difficulties that have been experienced, we are making progress. Noise compliance is being achieved in a reasonable, yet very effective, manner, and noise exposure to those living near our nation's airports is being reduced. Our present course will lead us to an even quieter environment.